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**APR 08 2005**

**OFFICE OF PETITIONS**

In re Application of	:	
Andre T. Barron, et al.	:	
Application No. 09/676,380	:	ON PETITION
Filed: September 29, 2000	:	
Attorney Docket No. 99-057	:	

This is a decision on the petition under 37 CFR 1.137(b), filed September 13, 2004, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information. See MPEP 711.03(c)(III)(C) and (D). The instant petition lacks item(s) 1.

A final Office action was mailed to applicant on July 29, 2003, which set a three (3) month shortened statutory period for reply. An amendment and a request for a three-month extension of time under the provisions of 37 CFR 1.136 were filed on January 28, 2004. However, the amendment did not place the application in condition for allowance and the application became abandoned on January 29, 2004.

The proposed reply required for consideration of a petition to revive must be a Notice of Appeal (and appeal fee required by 37 CFR 1.17(b)), an amendment that *prima facie* places the application in condition for allowance, a request for continued examination (RCE) under 37 CFR 1.114, or the filing of a continuing application. See MPEP 711.03(c)(III)(A)(2). **Since the amendment submitted with the petition does not *prima facie* place the application in condition for allowance, the reply required must be a Notice of Appeal (and appeal fee), an RCE under 37 CFR 1.114, or the filing of a continuing application.** A copy of the Examiner's Advisory Action is attached herewith.

Petitioner argues that the application became abandoned due to an error on the part of the Examiner and requests a waiver of the petition fee.

In the petition, it is stated that petitioner believed the final office action had been withdrawn based on the Advisory Action (Advisory) that was mailed on March 11, 2004. It is not clearly understood why petitioner believed the final office action to be withdrawn when the first line of the Advisory states, "The reply filed 28 January 2004 fails to place this application in condition for allowance. Therefore, further action by the applicant is required to avoid abandonment of this application..."

Petitioner also states, “that it did not seem logical that a new response period had been not begun” because the Advisory indicated, “that there was a six-month reply period from the final office action.” Petitioner should note that the Advisory does not start a new period for reply but only informs applicant of the deficiencies of the reply. In no event can the statutory period for reply expire later than 6 months from the date of the final rejection. See MPEP §§ 706.07(f) and 714.13.

Further, it is noted that the reply was sent on the next to the last day of the statutory period. An applicant may delay a reply until the end of a statutory time period; in doing so, however, petitioner assumes the risk of encountering unforeseeable circumstances. Ex parte Warren, 1901 Dec. Comm'r Pat. 137 (Comm'r Pat. 1901). In this instance, the amendment submitted did not place the application in condition for allowance and petitioner did not have sufficient time remaining to prepare an acceptable reply within the six-month statutory period.

**In view of the above, the request to waive the petition fee is not accepted.**

Further correspondence with respect to this matter should be addressed as follows:

**By Mail:**

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By hand: U. S. Patent and Trademark Office  
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The centralized facsimile number is (703) 872-9306.

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3223



Marianne E. Jenkins  
Petitions Examiner  
Office of Petitions  
Office of the Deputy Commissioner  
for Patent Examination Policy

Attachment: Copy of Examiner's Advisory Action